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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 17 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rulemaking to Amend Part 1 and)
Part 21 of the Commission's Rules to)
Redesignate the 27.5-29.5 GHz Band and)
to Establish Rules and Policies for)
Local Multipoint Distribution Service;)
)

CC Docket No. 92-297

Comments of Video/Phone Systems, Inc.

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Dated: March 16, 1993

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SUMMARY

Video/Phone supports the Commission's proposal to allocate the 27.5-28.5 GHz band to a new, wireless local broadband service. As an early proponent of the new service, Video/Phone believes that the public interest would be advanced by such an allocation. As detailed in these comments, Video/Phone envisions a service that will support a broad range of new applications. Moreover, Video/Phone believes that a nationwide network of local 28 GHz systems will emerge, and Video/Phone has designed a system to serve the expected needs of customers who would utilize such a network. As a result, Video/Phone urges the Commission to view the new 28 GHz service as much more than a cable television delivery medium. The marketplace demands more, and the technology can provide more.

Video/Phone urges the Commission to adopt Rules that will permit the service to be application and technology neutral, and suggests a few modifications to the Notice's proposals to ensure that marketplace demands can be satisfied. Video/Phone also supports the Commission's efforts to discourage insincere applicants, and comments on those aspects of the proposed Rules as well. Finally, Video/Phone urges the Commission to preempt state regulation of this service, and suggests some modifications to the proposed Rules that will help ensure the development of a competitive marketplace.

In conclusion, Video/Phone urges the Commission to move ahead quickly with the allocation and processing of applications, and believes that the prompt implementation of the 28 GHz

service, as envisioned by Video/Phone, will well serve the public interest.

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Comments of Video/Phone Systems, Inc.

Video/Phone Systems, Inc. ("Video/Phone"), through its attorneys, hereby comments on the Commission's proposal to establish a new service in the 28 GHz band.^{1/} In a petition for rulemaking filed January 15, 1992, Video/Phone proposed the creation of the Local Wireless Broadband Service ("LWBS") in order to fill a perceived void in local broadband distribution, and the Notice issued by the Commission is partially in response to Video/Phone's request. In addition to the foregoing petition for rulemaking, Video/Phone has, through related companies, filed applications to provide LWBS in a number of markets and has requested that the Commission waive certain provisions in Part 21

^{1/} Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, FCC 92-538, released January 8, 1993 (hereafter cited as "Notice").

of the Commission's Rules.^{2/} Thus, as one of the early proponents of this service, Video/Phone has a strong interest in the outcome of this proceeding.

As set forth in greater detail below, Video/Phone supports the Commission's proposal to establish this new service in the 28 GHz band, and suggests a few modifications to the proposed Rules primarily to ensure application and technology neutrality.

I. The Proposed Allocation Will Advance
the Public Interest

Video/Phone believes that the proposal to allocate the 27.5 to 29.5 GHz band in two blocks for the use of licensees who would provide wireless local two-way broadband distribution services in markets throughout the United States will well serve the public interest. As a result of this action, many highly productive uses will be made of frequencies that are now lying fallow, including the provision of "wireless cable" services

^{2/} In the Notice, the Commission denied the applications filed by the companies related to Video/Phone, as well as all applications filed by other parties, notwithstanding the fact that the Commission had been accepting the applications for filing for almost 18 months and had been placing them on public notice with specific reference to the cut-off provisions of Section 21.27 of the Commission's Rules. Notice at paras. 51-53. As detailed in Video/Phone's petition for reconsideration, the Commission has the requisite authority to grant the waivers and there is ample precedent for the Commission to have done so. Moreover, the Commission should not have summarily denied the applications without first considering the merits of each. Instead, the Commission's analysis was wholly conclusory and failed to consider adequately the public interest benefits that would likely flow from grant of waivers and prompt deployment of the new service.

competitive with those provided by traditional wireline cable companies, a goal articulated by the Commission and shared by Congress.^{3/} In addition, low cost alternative local access circuits for the distribution of high- and low-speed data traffic and video applications will become possible. Most importantly, in Video/Phone's view, the allocation of spectrum as proposed in the Notice will allow the full development of other new, two-way broadband applications, such as distance learning, telemedicine, high quality two-way videoconferencing at DS-1 or higher rates, business and professional television, halfduplex data base services, and metropolitan area LAN interconnection.

Allocation of spectrum in the 28 GHz band for the new service will also serve the public interest by creating the needed incentives for the U.S. to maintain its current technological lead in millimeter wave transmissions. Through the efforts of the National Telecommunications and Information Administration (NTIA) labs and private entrepreneurs like Video/Phone, the U.S. has developed the capability to make practical use of the 28 GHz band. The efforts of private companies such as Video/Phone in developing this pioneering technology are precisely the type of activity the Commission has

^{3/} Cf., Telephone Company-Cable Television Crossownership Rules, CC Docket No. 87-266, FCC 91-234, released November 22, 1991 at para. 8 ("our regulatory approach should foster competition in the video and communications market, so that free market forces rather than governmental regulation will determine the success or failure of new services"); Cable Television Consumer Protection and Competition Act of 1992, Public Law No. 102-385.

been trying to stimulate.^{4/} This leading edge technology can create excellent opportunities for U.S. companies to manufacture equipment for export.^{5/} Such export activity, in turn, will create jobs in this country and affirmatively help the U.S. trade balance. However, other countries are likely to attempt to copy

band to support such a service.⁷ Based on this analysis, Video/Phone believes that its understanding of the marketplace differs to some extent from that of the Commission and Suite 12, the other early proponent of 28 GHz services.

Video/Phone disagrees with the Notice's conclusion that "the most likely use will be to provide video [*i.e.*, cable television] programming." Notice at para. 14. While the 28 GHz band certainly has the capability of relatively inexpensively supporting cable television services, this is a market which has reached relative maturity in this country and there are other

blocked not by the absence of a gigabit backbone, but by the lack of local access."^{9/} Only wireless systems will be able to meet the need for rapid deployment of local broadband services.^{10/}

However, in order to meet these unserved market demands, it is necessary to have a technology suited to the needs

of the rural and underserved areas.

Finally, because Video/Phone perceives the market to be driven largely by such two-way broadband applications, rather than by cable television, Video/Phone anticipates (and intends working towards the creation of) a nationwide "network" of independent local licensees that will allow the 28 GHz spectrum to be used for nationwide videoconferences and narrowcasting. This network will be fashioned along the lines of other successful telecommunications and communications networks. Affiliation with the Video/Phone network will provide the following benefits to the licensee and customer:

1. Direct instant interconnection through all IXC Points of Presence (POPs) to create a seamless end-to-end service.
2. Standard hardware and software specifications.
3. One composite invoice for all network customers.
4. Ubiquitous local connections of high speed data, compressed video communications and video conferencing and future HDTV applications.
5. Lower cost and equal or superior quality to fiber or coaxial cable connection.
6. Rapid installation and turn-on for occasional use service not possible by wireline networks.

The proposed Video/Phone National Network is expected to interconnect up to 100 major metropolitan areas in its initial stage of operation.

The Network's national control center will enable customers to obtain rapid response to technical problems, and the Video/Phone national training program will ensure that local operational personnel will be thoroughly trained in the most advanced procedures.

Video/Phone intends to respond to marketplace forces to create a commercial nationwide network within the framework described above. The rules and regulation of the 28 GHz service should be crafted to allow maximum flexibility of service so long as there is no interference to adjacent licensees.

Video/Phone recognizes the national interest in creating a seamless nationwide "electronic superhighway" as described by Vice President Al Gore. Video/Phone applauds the concept and recognizes that time is of the essence if the United States is to remain the major force in telecommunications, thereby stimulating the economy and creating thousands upon thousands of new jobs. The service as envisioned by Video/Phone will help reach that goal.

III. Comments on Specific Aspects
of the Proposals in the Notice

Video/Phone supports the Commission's efforts to allocate spectrum in the 28 GHz band for the new service. Video/Phone offers the following comments on some of the specific details set forth in the Notice, and observes that its disagreements with the Commission's proposals stem, primarily, from its view that the main use of the spectrum will not be to provide cable television service.

A. The New Service Should Be
 Applications Neutral

Video/Phone supports the Notice's proposal, which because of its silence with respect to this issue, would seem to allow the licensee the flexibility to configure its offerings to meet the demands of the marketplace and to utilize fully the capabilities of any technology. In short, Video/Phone believes the Commission should not attempt to restrict the nature of the services to be provided.

However, Video/Phone urges the Commission to adopt specific language in its rules stating clearly that licensees can distribute any form of communications the marketplace demands. While we believe that this is the intent of the Notice, a specific affirmation of this intention would be extremely beneficial to the new service.

B. The New Service Should Be
 Technology Neutral

Video/Phone also believes that the Rules should be technology neutral. By doing so, the marketplace would be allowed to determine the most efficient designs for the intended applications. For example, the Commission should not dictate whether analog or digital transmissions, linear or circular polarity, large or small cell designs, or other factors will be mandated. Video/Phone believes that this, too, is implicit in

the rules proposed by the Commission; however, a specific

provide 28 GHz service as common carriers. Such a limitation
will assure that potential competitive abuses are minimized,

negotiating for specific sites in advance of an award of a license. Moreover, it would give the successful applicant some flexibility in subsequently choosing transmitter locations without having given up all of its bargaining power to the specified site lessors. This would also have the added benefit of eliminating any requests for extensions in construction deadlines due to alleged site unavailability. Video/Phone believes that the proposed Rules are consistent with such an application procedure, and would like the Commission to confirm this interpretation (or modify the Rules to specify such a procedure).

E. Eligibility and Preferences

1. Minority Preference

Video/Phone believes that the 28 GHz service should not be viewed merely as a wireless cable media and herein urges the Commission to recognize more fully the broader capabilities of the service. Under this view, the new 28 GHz service would not properly be classified as a "media of mass communications" because of its broader capabilities as discussed above. As a result, Video/Phone believes that minority preferences should not be applicable. The basis for the statutory minority preference is the notion that minority broadcasters should be encouraged; but since this service should not be regarded as broadcasting, then minority preferences would not serve the

Congressional goal embedded in Section 309(i)(3)(A) of the Communications Act.^{14/}

2. Diversity Preferences

A separate concern arises with respect to the Commission's goal of seeking to foster competition between the two 28 GHz licensees in each territory, and between the 28 GHz licensees and other transmission media, including copper, coaxial cable, fiber optics and other wireless media such as MMDS. This goal of competition would be furthered by encouraging applicants which do not have other media interest in the marketplace to apply.^{15/} In short, Video/Phone believes that the Commission should adopt a diversity preference for any applicant for 28 GHz service that is not associated with any of these other potential competitors in the territory proposed to be served by the 28 GHz application. Such a preference could be awarded in a lottery

^{14/} The Notice's proposal to allow the applicant to "elect" to be a media of mass communication and claim a minority preference is also fraught with the potential for abuse, and should therefore be abandoned. If such an election is not enforced, then the preference becomes a charade, and if the election is enforced, then the 28 GHz licensee would not be able to take full advantage of the capabilities of the 28 GHz services. The marketplace should determine the highest and best use of the 28 GHz spectrum; the use of the spectrum should not be driven by artificial regulatory advantages to be gained in a lottery.

^{15/} Similarly, Video/Phone agrees with the Commission that no set-asides are warranted. Notice at para. 19.

proceeding, assuming the number of applications renders a lottery necessary.^{16/}

3. One to a Market Rule

Video/Phone also supports the Commission's proposal to limit an applicant to a single application in each market. The lottery mechanism has, unfortunately, been abused and the final Rules should reflect the knowledge gained in other arenas. See pp. 18-19 and 22-23, infra. Video/Phone is concerned, however, that an overly strict interpretation of proposed Rule Section 21.1010(a) could interfere with an entirely legitimate goal of establishing a nationwide network of independent 28 GHz licensees. From a business standpoint, it is more efficient to begin organizing such a network in advance of the lottery selections. Applicants in each market need to become part of the network before the lottery is held in order to ensure the most efficient interoperability of the Network.^{17/} Video/Phone seeks clarification that such contracts, if disclosed at the time of

^{16/} If it turns out that comparative hearings would be manageable, then the diversity issue would become a comparative factor to be considered at the hearing.

^{17/} Video/Phone believes any such agreements with applicants should be purely bilateral and only effective if the applicant is successful, i.e., the agreement should not allow an unsuccessful applicant in any manner to share profits, ownership or other interests with the successful applicants. Thus, such an agreement between Video/Phone and an applicant for 28 GHz service is not intended as a "risk sharing" agreement, a "pooling" agreement or a settlement between multiple applicants, but rather a mechanism for efficiently operating a nationwide system as required by the exigencies of the marketplace.

filing by the applicants (or thereafter within 30 days of signing), would not run afoul of the proposed Rules.

F. Preemption

The Notice seeks comment on the issue of preemption of state regulation by the Commission. Notice at paras. 28-29. Video/Phone believes that the Commission should preempt state regulation of the new service to ensure its full and rapid development on a nationwide basis. Clearly, because the new service will be utilized, in part at least, to distribute cable television, such a service is inherently interstate in nature.^{18/} So, too, are the other proposed two-way broadband services which do not fall within the definition of "telephone exchange service," and therefor appear to be outside the ambit of Section 221(b) of the Communications Act.^{19/}

Moreover, since the capacity of the system can readily be shifted between television services and other two-way, broadband services, any attempt by the States to impose regulations on the latter category of services would likely impinge on the television services as well. In this regard, the

^{18/} New York State Commission on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982)

^{19/} Cf., Digital Termination Service, 86 FCC 2d 360,390 (1981) ("even if DTS facilities may have some voice capacity, it will not be 'telephone exchange service' within the meaning of [Section 221(b)]. The purpose of Section 221(b) was to reserve to the states jurisdiction over local telephone exchanges which serve single multi-state areas. North Carolina Utilities Commission v. FCC, 552 F.2d 1036, 1045 (4th Cir.), cert. denied, 434 U.S. 874 (1977).").

clearly interstate television services are inseverable from the other broadband applications, justifying FCC preemption of the new service.

Finally, inconsistent regulation of the two-way broadband services in different states would likely hinder the development of a nationwide service, which, as Video/Phone indicated earlier, it anticipates the marketplace will demand.^{20/} Thus, in light of the interstate nature of the services, and the potential for interfering with the federal policy supporting the prompt deployment of these 28 GHz services that could occur from state rate or entry regulation, the Commission should preempt any inconsistent state regulation of this service.

G. Minimum Population Served Criteria

Video/Phone does not believe that the Notice's proposal to require an applicant to engineer and construct a system which makes service available within three years to at least 90% of the population residing within the service area is the best means of assuring "the best possible service to the public." Such a standard only makes sense if it turns out that the marketplace decides that 28 GHz should be a cable television transmission medium, or at least that such a usage will constitute the initial use. As indicated above, Video/Phone believes, instead, that the 28 Ghz service will be used initially and primarily to provide

^{20/} Cf., Digital Termination Systems, 86 FCC 2d at p. 390.

two-way broadband telecommunications services that are presently unavailable to businesses.

If the market develops as anticipated by Video/Phone, then the requirement to design and construct a system to serve 90% of the population in the Basic Trading Area within three years could prove to be uneconomical. Video/Phone thus suggests that applicants be entitled to design and construct a system that would make service available to either (i) 90% of the business

establishment 21/ (ii) 90% of the population within the Basic

and that service will be made available to the public in a timely manner. The financial showing will also help to minimize the risk of filings by insincere applicants, or by applicants seeking to gain an unfair advantage by "stacking" the lottery process.

In other services, there have been instances where multiple applications are filed by related individuals, e.g., a husband, a wife, children and parents will all file for the same markets. A strict application of the financial showing requirement should minimize such attempts to abuse the lottery process by cumulating entries, since each individual applicant would have to demonstrate that he or she had assets sufficient to construct and operate the proposed system, or if the applicant was relying on a bank for financing, the bank would have to base its credit analysis on the creditworthiness of the individual applicant. Likewise, a strict application of this financial requirement would minimize the likelihood of insincere applications, since a mere accommodation letter from a bank (arranged by an application mill) would be inadequate. Thus Video/Phone urges the Commission to adopt the proposed Rule and to indicate that it will apply the financial requirement in a strict manner.

I. Transfers Before Construction is Completed

Another aspect of the Commission's proposed Rules intended to discourage insincere speculators from applying for the 28 GHz licenses is the prohibition on the transfer of any

interest in a conditional license prior to the completion of all construction authorized in the license. Video/Phone supports the Commission's goal of seeking to eliminate speculators, and so supports the proposed Rule. Video/Phone has a concern with the Rule as drafted, however. The restriction on "any form of alienation" of "any interest" in the conditional license could adversely impact a legitimate business practice -- the granting of stock options to employees as an inducement to work for the company and/or the exercise thereof subsequent to the date the application was filed.^{22/} Video/Phone thus urges the Commission to create an exemption in proposed Section 21.1015 to permit such an employee benefit to be provided prior to the completion of construction.

J. Selection Process

Video/Phone recognizes that it is likely to be necessary to utilize a lottery to select among applications. The public interest would not be well served by the delay that would result from comparative hearings, nor does the Commission have the substantial resources necessary to conduct nearly 1,000 such hearings. Video/Phone also believes that the public interest would be disserved if licensing were delayed pending the

^{22/} Video/Phone assumes that despite the broad language, this provision is not intended to make legitimate financing activities unlawful, since proposed Sections 21.1011(c) and 21.1011(e) certainly contemplate outside funding of construction. The Commission should confirm that proposed Section 21.1015 does not prohibit outside financing utilizing security interests in the equipment or the company's stock.

Commission's receipt of authority from Congress to conduct auctions as a means of awarding licenses for the 28 GHz service. Video/Phone does not believe that such authority will be forthcoming in the near future, since the present proposals are only for limited authority to conduct auctions.

Video/Phone thus supports lotteries as the best method for initiating service to the public in a timely manner. Video/Phone suggests one modification to the procedure proposed in the Notice, however. Video/Phone agrees that if the Commission selects and names more than just the winning applicant, there is a likelihood of greater litigiousness as the "second" or "third" selectees would attempt to have the winner disqualified. Selecting only the winner, however, creates the need for an additional lottery if the winner is disqualified, and the necessity for such a subsequent lottery could cause needless delay. As an alternative, Video/Phone suggests that the Commission, with appropriate safeguards, select several applications, but only reveal the identity of the winner; if the winner is subsequently disqualified, then (and only then) would the Commission reveal the identity of the next selected applicant. This procedure would avoid the need to conduct additional lotteries, without creating a particularly strong incentive for any non-winning applicant to challenge automatically the qualifications of the winner.